92-1491

Supreme Court, U.S.
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No. 92-1634

In The

Supreme Court of the United States

October Term, 1992

A.L. CROUCH and M. REASE PARTON, Plaintiffs-Appellants; and CHRISTINE McCARTNEY, ETC., ET AL., Appellants

Petitioners,

v.

BOY SCOUTS OF AMERICA, LONGHORN COUNCIL, BSA, and BEN LOVE, KENT GIBBS, T. J. VAN HOUTEN, DANIEL SHERWIN, W.T. WILLIS, and THURMAN SCHWEITZER, who are being sued in their representative as well as their individual and personal capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 1993

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58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioners, by reason of the unanimous ruling of the Supreme Court on March 3, 1993, in the *Andert-Leatherman* cases, may proceed to trial in this federal conspiracy lawsuit involving 42 U.S.C.A. 1985(3), on a "short and plain statement of the claim," instead of the "heightened pleading standard" most federal courts have heretofore required in civil rights cases.

2. Whether the district court wrongfully granted a summary judgment to Defendants in a case that was set for trial on the jury docket on the theory that there were no disputed issues of fact.

3. Whether the district court wrongfully granted a summary judgment without notice or opportunity to be heard, without considering a motion for continuance and a motion to amend the pleadings, and whether the court abused its discretion in denying leave to Plaintiffs to amend their pleadings before the motion for summary judgment was considered.

4. Whether petitioners have been denied Texas due process by refusal of respondents to grant them a hearing on their appeal from the rulings of advancement committees of the Longhorn Council without notice, without opportunity to be heard, and without any reason ever being given, with said respondents repeatedly substituting legislation for interpretation and ignoring petitioners as though they never existed.

5. Whether inadequate findings of fact and conclusions of law are sufficiently comprehensive and pertinent to the issues to provide a basis for decision may be

QUESTIONS PRESENTED FOR REVIEW – Continued

remanded to district court for supplementation, and whether failure to grant injunctive relief in support of ruling that the workbook is not a requirement for advancement may be remanded to district court for implementation.

LIST OF PARTIES

All parties to the proceeding below are identified in the caption of this petitioner except seven minors and their parents (including Christine McCartney, who is named in the caption) who are also appellants.

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit from which review is sought is not reported; it is attached hereto as Appendix A to this petition.

The Memorandum Opinion and Order of the District Court for the Northern District of Texas is attached hereto as Appendix B to this petition.

The judgment of the District Court for the Northern District of Texas is attached hereto as Appendix C to this petition.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment from which review is sought on December 9, 1992. No request for rehearing was made. Jurisdiction is conferred upon this court by 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First, Thirteenth and Fourteenth Amendments

Texas State Constitution

Statutes

42 U.S.C. 1981
42 U.S.C. 1983
42 U.S.C. 1985
42 U.S.C. 1985(3)
42 U.S.C. 1986

STATEMENT OF THE CASE

1. Advancement

This lawsuit began as an attempt on the part of petitioners to have the court construe and enforce the rules, regulations and requirements pertaining to advancement to the rank of Eagle Scout. Three problems were confronted: (1) whether a 16-page literacy test that was not an official requirement could be enforced by the Longhorn Council. The attorney for the Longhorn Council ruled it was not a requirement, and the national organization issued an 8-page optional *Eagle Scout Service Project Workbook*, No. 18-927, which the District Judge has now ruled is not a requirement for Eagle Scout; (2) there is no specified number of hours for the Eagle service project, but petitioners have located a supplemental agreement which the parties have accepted as 12 hours; (3) the boards of review as defined by the *Boy Scout Handbook* for 17 years have all been on the unit level, but respondents have unilaterally attempted to alter this custom.

Petitioners request that the incomplete judgment be remanded to the district court so that petitioners may

submit a motion for a partial summary judgment covering only these three points. See Appendix for the wording of the proposed motion on boards of review and Appendix for the wording of the proposed motion on the 12-hour ceiling on Eagle service projects.

2. Conspiracy

A. The Board of Intimidation

On the evening of September 22, 1988, approximately thirteen elitist conspirators convened two separate unauthorized clandestine "Eagle Scout boards of review" for the sole purpose of persuading, coercing and intimidating Mr. and Mrs. Ronald Etheredge into permitting their son, Eric Etheredge, to comply with two preconditions for advancement to the rank of Eagle Scout which had never been authorized by the Executive Board of Boy Scouts of America as requirements for Eagle Scout:

(1) They forced him to perform a second Eagle Scout service project, although he had already completed one service project which had been approved by the Scoutmaster and four members of the Troop Committee, which amounted to involuntary servitude.*

(2) They forced him to use and complete a bootleg 16-page literacy test going under the assumed name of *Longhorn Council Eagle Scout Service Project Workbook.*

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*Prohibited by XIIIth Amendment, *Bailey v. Alabama*, 219 U.S. 219 (1911).

There shall be the following ranks in Boy Scouting: Tenderfoot, Second Class, First Class, Star, Life, and Eagle. *The requirements shall be those* authorized by the Executive Board and set forth in official Scouting publications. *Advancement Guidelines,* No. 3087A, 1988 printing, page 3.

Advancement requirements must be fair and uniform. No council, district, unit, or individual has the authority to add to or subtract from advancement requirements. *Advancement Guidelines,* No. 3087A, 1988 printing, page 6.

Plaintiff A. L. Crouch was never notified of these two so-called "Eagle Scout boards of review," although as Scoutmaster of the Eagle candidate he was entitled to be present.

The candidate's unit leader introduces him to the members of the board of review. The unit leader may remain in the room but does not participate in the board of review. *Advancement Guidelines,* No. 3087A, 1988 printing, page 16.

On December 15, 1990, Plaintiffs, in their written interrogatories numbered 14 and 15, requested *for the third time* the names of these thirteen men in the following language: "The names of these conspirators have been previously requested by written interrogatories on March 17, 1989, and again on January 15, 1990."

These thirteen men knew or should have known before the two so-called "Eagle Scout boards of review" took place that:

(a) "No council, district, unit, or individual has the authority to add to or subtract from advancement requirements."

(b) Boy Scouts of America had, in effect, by federal preemption, outlawed and rendered obsolete the 16-page *Longhorn Council Eagle Scout Service Project Workbook* by printing an 8-page official national workbook of its own, which was also not a requirement for Eagle Scout but was optional. (June-July, 1988, issue of Longhorn Council *Pace-Maker*)

It is the meaning of the terms at the time of the enactment of the Statute that is sought and that governs. 50 Amer. Jur. p. 224, par. 236. *Big Lake Oil Co. v. Reagan County* CCA El Paso, 217 S.W.2d 171, 173, 1948.

(c) Robert A. Parmelee, as attorney for the Longhorn Council and the Council Advancement Committee (the very committee which had called these two meetings), had officially ruled in a letter to Plaintiff A. L. Crouch, dated June 28, 1988, that the 16-page *Longhorn Council Eagle Scout Service Project Workbook* was not a requirement for Eagle Scout. And,*

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*Carbon copies of this letter were mailed to the following:
Jim Harper, District Scout Committee Chairman
Jim Cunningham, District Executor (sic)
Jim Atkinson, District Commissioner
W. T. Willis, Council Advancement Committee Chairman
Reese Partan, Troop 32, Advancement Committee Chairman
Ronald D. Etheredge, Troop 32 Committee Chairman
Dr. John Franko, Troop 32, Institutional Representative

(d) This lawsuit had already been filed on September 13, 1988, thereby depriving them of any possible jurisdiction over the subject matter of pending litigation.

However, there was one thing these thirteen men probably did not know, and that was that Eric Etheredge had a part-time job and would actually be deprived of personal income by having to perform a second Eagle Scout service project.

(e) On December 2, 1989, respondents filed an Amended Answer in which they admitted the workbook was not a requirement. On December 4, 1989, attorney James Harper wrote a memo to the entire district ruling that the 8-page workbook was not a requirement. And on June 24, 1992, the district judge signed an order declaring "The national Scouting organization does not require completion of any workbook by Eagle Scout candidates." This order specifically outlawed *Eagle Scout Service Project Workbook*, No. 18-927, the only workbook in existence on the date the judge signed the order.

B. Involuntary Servitude

On page 9 of the Memorandum Opinion and Order dated June 24, 1992, the district judge wrote as follows concerning the federal conspiracy statute applying to litigation in the state courts, 42 U.S.C.A. 1985(3):

The Plaintiffs' only hope of presenting a claim under 1985(3), it appears, would be to assert a conspiracy to deprive individuals of their rights due to a "class-based, invidiously discriminatory animus." *Griffin* at 102.

Petitioners are requesting leave of the Court to amend their pleadings "to assert a *conspiracy to deprive* individuals of their rights due to a class-based, invidiously discriminatory animus."

But, in connection with this point, Petitioners quote from Paragraph 6 of Plaintiffs' Original Petition which they filed in the State Court on September 13, 1988, and incorporated by reference into their Federal Complaint: "[S]aid Boy Scout Troop . . . presently has four members who are attempting to advance to the rank of Eagle Scout, namely: Eric Etheredge, Marc McCartney, J. P. Schweiterman, and Andrei Williamson, whose civil rights, under 42 U.S.C.A. 1981 ff., and whose constitutional rights . . . are being threatened with irreparable damage by certain *ultra vires* decisions and actions of said defendants. Plaintiffs have not only a right but a duty to protect these four Eagle candidates, as well as possible future Eagle candidates of this Troop (including a present black Star Scout, Keith Brooking, and the two Trevizo brothers who joined the Troop about June 1), in the exercise of their federal constitutional right to be considered for advancement to the rank of Eagle Scout "without the burden of invidiously discriminatory disqualifications." See *Turner v. Fouche*, 24 L. Ed. 2d 567.

The District Judge, on page 9 of the same order, also had this to say: "Although the Plaintiffs have stated that boys were discriminated against, they have not set forth evidence demonstrating a pattern of discrimination against Hispanic boys or black boys."

However, the record shows (RO74) that in early 1978 just before the Eagle Board of Review convened, the

District Advancement Chairman called the Scoutmaster to one side and tried to persuade him to withdraw Richard Ramirez, a boy he had never seen before, from consideration because "he was only twelve years old and too immature." (RO74). Two Hispanic Eagles at the same court of honor was too much for the Advancement Chairman. But Richard received his Eagle badge along with the other four boys.

On March 21, 1981, Troop 32 had another Eagle Court of Honor for five Troop members, including a black candidate by the name of Jim Jones. An apparent attempt was made to sandbag the Eagle application of the black candidate by unknown vandals who wrecked the Eagle service project which was being erected on the playground of Our Mother of Mercy Catholic Church (of which Jim Jones was a parishioner) by several members of Troop 32 – all of whom were white except Jim Jones. Only a Jury can determine whether there was racially motivated sabotage directed at Jim Jones, the black candidate. Also, just two or three days before the Eagle Court of Honor a burglar broke into the Scoutmaster's office and stole two Eagle badges, one of which had been presented to the Scoutmaster in 1930, and the other which had just been received from the Longhorn Council office. Although this break-in does not appear in the Record, it was promptly reported in writing to the Fort Worth police. And only a jury can determine whether the theft of these two Eagle badges was a racially motivated attempt to prevent the black candidate from receiving his badge; but, nevertheless, Jim Jones became an Eagle Scout along with the other four candidates.

About 1984, the Longhorn Council, BSA, published a brochure entitled *Scouting, It's More Than Just a Uniform,* which on page 6 made this statement: "In the Fort Worth area, two out of six boys ages 6-10, and one out of four boys ages 11-14 are Scouts. One out of every six youths served by the council is Hispanic . . . *But not one word is said in this brochure about black Scouts in the Longhorn Council.* (App. 26)

And what happened to the two Trevizo brothers? They never made it to Eagle because both of them were physically assaulted on the church parking lot after returning from a weekend campout with the troop. The father of one of the other boys attacked the two brothers without warning, reason, explanation or provocation. The Scoutmaster advised Mr. Trevizo to make a formal complaint to the police or the District Attorney's office, but he declined to do this and just took his boys out of the Troop. The man who assaulted the two brothers also abruptly took his son out of the Troop, and we never saw him or his son again. See pages 19-23 of Response of Plaintiffs to Defendants' Amended Motion for Summary Judgment. (R136) and pages 17-24 of Brief in Support of Plaintiffs' Motion to Compel Further Response to Interrogatories (R310) for a detailed history of what happened. This program to invent new requirements to discourage Eagle candidates finally came to a climax with what might be called a Board of Intimidation, which was illegally convened by a committee of "bullies" who forced Eric Etheredge to complete a 16-page literacy test called *The Longhorn Council Eagle Scout Service Project Workbook,* which Robert Parmelee, attorney for the Longhorn Council and the Council Advancement Committee, had

already ruled was not a requirement for Eagle; to perform two service projects instead of one; and to attend five boards of review instead of just one (and all of these illegally convened). As a result of all these shenanigans, two Eagle candidates from Troop 32 gave up and never finished Eagle – Andrei Williamson, who had finished all of his requirements, including the service project, except for 1/4th of one merit badge, and Keith Brookins, a black candidate, who had finished all of his requirements except the service project. Both of these boys attended a few meetings of the troop after this but soon dropped out of Scouting, but every time we saw Keith Brookins he kept complaining that he had been discriminated against. This young man was deliberately intimidated and deprived of his federal constitutional right to freedom from "involuntary servitude," which was defined by the United States Supreme Court in *Bailey v. Alabama*, 219 U. S. 219 (1911), as "all control by coercion of one man for the benefit of another."

REASONS FOR GRANTING THE WRIT

Texas Due Process

In Response of Plaintiffs' to Defendants' Amended Motion for Summary Judgment filed April 31, 1989, four pages (R151-R154), under the heading "Voluntary Association" discuss at length the case of *Hatley v. American Quarterhorse Association*, CA 5, 552 F.2d 646 (1977), which seems to be "on all fours" with the case now before the court.

The *Hatley* decision begins by saying, "Courts take cognizance of right of association member to participate in advantages incident to membership, and deprivation of pecuniary benefits resulting from contractual relations raises dispute to level of justiciability." Respondents claim that petitioners have not been deprived of any property rights and cannot rely on the case. But a California court has recently overruled this common law principle relied upon by respondents in the case at bar by declaring that "*membership in an association, with its associated privileges once attained is a valuable interest which cannot be arbitrarily withdrawn.*" *Curran v. Mount Diablo Council, Boy Scouts of America,* 195 Cal. Rptr. 325 (Cal. App. 2 Dist., 1983). And, according to *Talton, et al. v. Behncke,* U.S.D.C. N.E. Ill., 1952, 106 F. Supp. 157. "Personal rights are entitled to protection of courts, and to hold otherwise would be to deny rights of due process."

The American Quarterhorse Association is a nonprofit Texas corporation, and so is the Longhorn Council, BSA.

On April 14, 1988, the Scoutmaster and Assistant Scoutmaster of Troop 32 went to a district board of review (illegally convened) with two Eagle candidates, Mark McCartney and Andrei Williamson. They asked for guidelines, how many hours and what about the workbook. This committee allowed the boys to go through without a workbook, but refused to suggest any number of hours.

Then, on June 16, when Rease Parton tried to get another illegally convened board of review to approve Eric Etheredge's Eagle project, the board said that Eric

had to use the workbook – the first boy in Troop 32 ever to do so.

On June 28 the attorney for the Longhorn Council ruled that the workbook was not a requirement for Eagle. And petitioners attempted to appeal the ruling of the advancement committee by directing a 14-page protest to Respondent Ben H. Love, but the reply letter to petitioners from Ben Love, (App. 30), like the letter to Hatley, "did not give the plaintiff any right of appeal to any other body or committee . . . and the receipt of such a letter constitutes a final determination." *Hatley*, supra, page 657.

The *Hatley* case, being exactly in point, deserves to be quoted more fully, as follows:

> "The court of appeals held that where the plaintiff member of a quarter horse registering association requested that his colt be registered. . . . a subjective determination required exercise of discretion, and where such discretion had been exercised to register other horses, none of which had pedigree or conformation better than the colt in question, the executive committee decision to refuse registration without a hearing violated Texas due process. (page 646) Texas courts, in adjudicating claims such as Hatley's, require something akin to traditional due process on the part of voluntary associations. State action is inapplicable to the analysis. (page 656)
>
> And the 5th Circuit remanded the case to the district court for a hearing, The Executive Committee decision to refuse registration without a hearing violated Texas due process.

> We note that the district did not explicitly find that Naturally High is a quarter horse. It held only that the Association had forfeited the right to make that determination. However, the district court is well equipped to do so. We therefore remand the case for a hearing. (page 657)

12 Hours

Whether, as a matter of law, the patent ambiguity of the present community service project requirement for advancement to the rank of Eagle Scout, which fails to set either a minimum or a maximum number of hours of service, can be resolved by the inclusion into said requirement as an amendment the following undisputed allegation from Plaintiffs' verified response to No. 7 of Defendants' First Set of Interrogatories under date of February 25, 1990: "The supplemental agreement expressed in *Eagle Scout Projects, Boy Scouts of America,* sets a fixed number of hours for the Eagle service project . . . 12 hours of actual work . . . by the candidate and those recruited to assist him." And whether Respondents should be permanently enjoined from requiring or attempting to require more than 12 hours of actual work by the Eagle candidate and those recruited to assist him for the Eagle Scout service project.

If written contract containing express merger clause is clear and unambiguous and not subject to more than one interpretation it need not be open to judicial interpretation. . . . Absent latent or patent ambiguity, meaning of the contract is to be decided by the court. *Southampton Co. v. Stinnes Corp.*, 5 Cir. 733 F.2d 1108, 1109 (1984).

Boards of Review

Whether, as a matter of law, the *Boy Scout Handbook* for the entire, continuous 17-year period from 1972 through 1988 (the date this lawsuit was filed) has consistently and correctly construed the BSA Federal Charter; the BSA Bylaws – Article VI, Section 5, clause 1; and the BSA Rules and Regulations – Article X, clause 7 to authorize and require all advancement boards of review to be conducted at the unit level as follows: (1) a Patrol Leaders' Council Board of Review for the lower three ranks – Tenderfoot, Second Class, and First Class; and (2) a Troop Committee Board of Review for the upper three ranks – Star, Life, and Eagle. And whether Respondents should be permanently enjoined from requiring or attempting to require any advancement board of review for any of the six ranks in Scouting except at the unit level as set forth in the *Boy Scout Handbook*.

The handbook [of AQHA] heretofore mentioned is in substance a part of the By-Laws of the membership of AQHA. As between Matlock Rose and AQHA it constitutes part of the contract of each with the other. *American Quarterhorse Association v. Rose,* CCA FW 525 S.W. 2d 227, 1975.

Courts must take judicial notice of act of Congress under which Boy Scouts of America was organized, and of constitution, by-laws, and annual reports of organization filed with Congress in accordance with act of Congress (36 USCA 21 *et seq* . . .) *Young et al. v. Boy Scouts of America, et al.,* Dist. Ct. of Appeal, 4th Dist., Cal., 51 P.2d 191, 1935.

JURY TRIAL

1. In paragraph 1, page 5, of the Memorandum Opinion and Order (R 450), the following conclusion of law is made by the Court: "Although conspiracy involves difficult questions of nuance and interpretation, the Plaintiffs seeking to avoid summary judgment still must demonstrate that the Defendants have engaged in a meeting of the minds." However, the U. S. Court of Appeals for the 7th Circuit, in the case of *Hampton v. Hanrahan*, 600 F. 2d 600 (1979), ruled that an express agreement among all conspirators is not a necessary element of a civil conspiracy, and said further that "When a plaintiff alleges a conspiracy to violate civil rights, existence or nonexistence of conspiracy is essentially a factual issue that the jury, not the trial judge, should decide. 42 U.S.C.A., Sections 1983, 1985(3). "* * * Assessing credibility of witnesses and weighing evidence are matters within sole province of jury." page 602.

PROPOSED AMENDMENTS

On June 19, 1992, petitioners filed an affidavit on membership and a motion for continuance which included a motion for amendment of the pleadings. The law is clear that even at this point the Supreme Court may remand a case to the trial court with instructions on whether to allow or disallow the requested amendments – one on State Tort Law and one on Membership. Petitioners respectfully request this court to consider the

propriety of allowing these proposed amendments to be added to the pleadings.

State Tort-Law

In Plaintiffs' verified answers to No. 7 and No. 20 to Defendants' First Set of Interrogatories, dated February 25, 1990, the following allegations were made by way of supplementing conspiracy claims with the addition of tort and negligence claims:

"Plaintiffs are preparing to file an Amended Complaint setting forth in more detail the facts in this case. But perhaps the best way to answer this question now is by referring to the case of *International Printing Pressmen and Assistants' Union v. Smith*, Tex Sup Ct., 1947, 198 S. W. 2d 729: "A parent organization . . . is liable for wrongful acts of one of its local organizations and its officers done in the line and scope of their duties as agents of parent organization. (P. 729) Interference with common-law right to labor gives rise to a cause of action in tort for damages sustained. (P. 731) * * * In actions for injury to persons or damage to property, where there is a contract between the parties and also a duty imposed by law, but the gravamen of the action is the negligence of the defendant, it is sometimes said that the action is one in tort, and not in contract." (P. 735)

In the case of *Kush v. Rutledge*, 460 U.S. 719, 722 (1983), we read: "The Court of Appeals affirmed the dismissal [of certain conspiracy claims] and remanded for further proceedings on the other state-law tort claims."

Membership

On June 19, 1992, Petitioners filed a 76-page undisputed affidavit that approximately 88% of the registered adult membership of the Longhorn Council, BSA, over the age of 21* (and by implication 88% of the registered adult membership of the national Boy Scouts of America over the age of 21) have been wrongfully disfranchised and thereby deprived of the most fundamental membership right by the world's largest voluntary association, which ironically operates under a charter granted by the Congress of the United States which obligates the organization to teach boys "patriotism, courage, self reliance, and kindred virtues." The Congressional Report in Support of Act to Incorporate Boy Scouts of America, in describing the Scout scheme, says, "In addition to requiring him to live up to a standard code of laws which insure development of character . . . , it requires him to study in order to pass certain tests of qualification." These tests include three merit badges on good citizenship, which all adult members are expected to teach by

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* In a recent California case, *Curran v. Mt. Diable Council Boy Scouts of America*, 147 Cal App 3d 712, 36 ALR 4th 607, 615, the following quotation appears: "Defendant urges this court to take judicial notice of Article VII, section 3 of the rules and regulations of the Boy Scouts of America. . . . Defendant argues that this section provides that a boy may be a Boy Scout until he is eighteen years old. * * * We have taken judicial notice of this section. . . . A reasonable construction . . . is that a boy must join the Boy Scouts before reaching the age of 18." This means that all adult members of the BSA between the ages of 18 and 21 have also been automatically disfranchised (along with 88% of those over the age of 21) and denied the right to serve on Eagle boards of review solely by reason of their age.

example as well as by precept. And wrongfully depriving the very men and women who work with the boys on the unit level of their right to vote and represent them in the decision making process and the election of officers is not the way to teach them good citizenship. As a matter of fact, it is un-American.

THE DEFAULTING CORPORATIONS

Article II of the Bylaws of the Boy Scouts of America, Section 1, provides that "the National Council herein provided for shall constitute the corporate membership of the Boy Scouts of America' to be known . . . as the National Council of the Boy Scouts of America." Clause 6 says "The duly elected president and council commissioner of a local council shall . . . be members of the National Council. Each local council may, in addition, elect one of its members as a member of the National Council for every 5,000 youth members, and at the biennial meeting of the National Council, the Executive Board is elected. But the Secretary of State of the State of Texas has certified (see App. 24) and also (App. 25) that there is no Texas corporation by that name and no foreign corporation by that name is authorized to do business in Texas. And, according to Article III, Section 2, Clause 4 of the bylaws, there are life members of the Executive Board of the BSA.

And what about the Longhorn Council? On May 7, 1985, the Secretary of State for the State of Texas (App. 28) involuntarily dissolved this corporation for not filing the statutory reports which had been delinquent for 120

days. The June 1985 Pace Setter (R 466) gives the names of 3 Life Directors of the Board of the Boy Scout Foundation of the Longhorn Council.

In the case of *Texas Farm Bureau Cotton Assn. v. Stovall,* 253 S.W. 1101, 1108 (1923), the Supreme Court of Texas wrote: "It is elementary that one denied the benefits of membership of an association may appeal to a court of equity for redress. 5 *Corpus Juris,* pp. 1358-1359, *Pomeroy's Equity Jurisprudence* (2d Ed.)"

And the Supreme Court of the United States, in the case of *Chicago City Railway Company v. Allerton,* 85 U. S. 233 (1873) held that changes in the purpose and object of an association, or in the extent of its constituency or membership are necessarily fundamental in their character, and cannot . . . be made without the express or implied consent of the members. * * * If the directors alone could do it, they could always perpetuate their own powers. Their agency does not extend to such an act unless so expressed in the charter or subsequent enabling act. . . .

Recently the Supreme Court has written, in the case of *Holt Civic Club v. City of Tuscaloosa,* 439 U. S. 81: It is, of course, established that once a "franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Bd. of Elections,* 363 U.S. 663, 665 (1966). Because "statutes distributing the franchise constitute the foundation of our representative society." *Kramer v. Union Free School Dist.,* 395

U. S. 621, 626 (1969), we have subjected such statutes to "exacting judicial scrutiny." *Id.*, at 628.

Respectfully submitted,

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March 1993

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1634

A.L. CROUCH, and
M. REASE PARTON,

Plaintiffs-Appellants,

CHRISTINE McCARTNEY, ETC., ET AL.,

Appellants,

versus

BOY SCOUTS OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(Filed Dec. 9, 1992)

Before JOLLY, DUHE, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellants for extension of time to file their brief is DENIED.

IT IS FURTHER ORDERED that the motion of appellees to dismiss the appeal is GRANTED.

APPEAL DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

A.L. CROUCH and M. REASE PARTON., Plaintiffs, v. BOY SCOUTS OF AMERICA, ET AL., Defendants.	* * * * * * * * * * *	No. CA3-88-2531-P

MEMORANDUM OPINION AND ORDER

(Filed Jun. 24, 1992)

Before the Court are the following motions: (1) the Defendants' Motion for Summary Judgment on Plaintiffs' Amended Complaint, filed February 27, 1989;[1] (2) a Motion to Intervene as Third-Party Plaintiffs, filed May 5, 1989; and (3) the Plaintiffs' Motion for Order that Facts Be Taken To Be Established, filed September 19, 1991.

Having examined the evidence presented, the arguments of counsel and the applicable law, the Court finds the Plaintiffs' motion that facts be taken as established should be DENIED and that summary judgment should be GRANTED for the Defendants. For reasons explained herein, the Court finds it shall consider the motion to intervene as moot.

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[1] This motion shall be considered in lieu of the Defendants' original Motion for Summary Judgment, filed January 13, 1989.

I. Facts and Contentions of the Parties

At issue in this case are the requirements and practices of the Longhorn Council of the Boy Scouts of America. The Plaintiffs, A.L. Crouch and M. Rease Parton, are Scoutmaster and Assistant Scoutmaster, respectively, of Boy Scout Troop 32 in Fort Worth. The Plaintiffs brought this suit, which they in their original Petition asked to be styled as a class action on behalf of "all other Scoutmasters and Troop Advancement Chairmen," to challenge the Longhorn Council's requirements of Boy Scouts seeking to advance to the special designation of Eagle Scout.

In their amended complaint, filed January 24, 1989, the Plaintiffs claim violations of 42 U.S.C. §§ 1343, 1983, 1985, 1986 and 1988. The Plaintiffs also claim breach of contract and violation of the U.S. and Texas constitutions, particularly regarding the freedom of association guarantee of the First Amendment, the right to equal protection set forth in the Fourteenth Amendment, privileges and immunities of citizenship, and the right not to be deprived of property without due process of law.

The Plaintiffs contend that the Defendants discriminated against Troop 32 by imposing, in 1978, a requirement that each Eagle Scout candidate complete a sixteen-page workbook detailing the candidate's planned Eagle service project before the project could be approved by the District Council. The national Scouting organization does not require completion of any workbook by Eagle Scout candidates. The Plaintiffs allege that the Longhorn Council imposed the workbook requirement in reaction to a 1977 story on Troop 32 in the *Fort Worth Star-Telegram*

that mentioned the troop's high number of Eagle Scouts, including many Catholic and Hispanic Eagle Scouts and perhaps the only black Eagle scout then existing in the Longhorn Council's jurisdiction.[2]

The Plaintiffs, noting that the Scouting district chairman had described the workbook as so complicated as to require Eagle Scout candidates to obtain adult help, compare the workbook requirement to a discriminatory literacy test. The Plaintiffs allege that the workbook was a device intended to prevent minorities, younger boys and disadvantaged boys from becoming Eagle Scouts.

The Plaintiffs also contend that the Defendants used other means of discriminating against Troop 32's Eagle Scout candidates. They state that the Longhorn Council lost records of merit badges earned by several boys, and that the District Board of Review, which approved all Eagle Scout service projects, browbeat some of Troop 32's Eagle Scout candidates during their interviews.

The Plaintiffs argue that the Longhorn Council violated the Boy Scouts' own regulations by imposing the workbook requirement, citing an authority called "Advancement Guidelines" that states "No council or district may add to the national requirements."

In the Defendants' motions for summary judgment, filed in January and February, 1989, they assert that the

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[2] *See* the Plaintiffs' Complaint and Petition In re: Eagle Scout Service Project Workbook of the Longhorn Council, Boy Scouts of America, directed to Ben H. Love, Chief Scout Executive, submitted with the Plaintiffs' amended complaint, filed January 24, 1989.

Plaintiffs lack standing to pursue this lawsuit. On May 5, 1989, a Motion to Intervene was filed by several parents, as next friends of their sons, Troop 32 members and Eagle Scout candidates. The Defendants, in their response to this motion, filed July 6, 1989, stated they had no opposition to the intervention, on the condition that the pending motion for summary judgment be deemed to have been filed against the intervenors, and that the intervenors adhere to the scheduling guidelines previously established for this case.

II. Motion for Summary Judgment

A. Standard for Summary Judgment

Summary judgment is proper where no genuine issue of material fact exists that would necessitate a trial. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). The party defending against a motion for summary judgment cannot defeat the motion unless he provides specific facts that show the case presents a genuine issue of material fact, such that a jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-7 (1986).[3]

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[3] When a defendant fails to respond to a motion for summary judgment, the court may not simply grant a "default" summary judgment. *Hibernia National Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985). The district court may, however, accept as undisputed the facts listed in support of the movant's summary judgment motion and grant the motion where the movant has made a prima facie showing of its entitlement to summary judgment. *Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988).

In considering motions for summary judgment, "the court must indulge every *reasonable* inference from [the] facts in favor of the party opposing the motion." *AT&T Co. v. Delta Communications Corp.*, 590 F.2d 100, 101-02 (5th Cir.) *cert. denied*, 444 U.S. 926 (1979) (emphasis in original); *see Hall v. Diamond M Company*, 732 F.2d 1246, 1248 (5th Cir. 1984).

In their claims under §§ 1985 and 1986, the Plaintiffs allege the Defendants engaged in a conspiracy. Although conspiracy involves difficult questions of nuance and interpretation, the plaintiff seeking to avoid summary judgment still must demonstrate that the defendants have engaged in a meeting of the minds. *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Absent evidence of significant probative force, summary judgment should be granted against a conspiracy claim, same as any other claim. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 557-58 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981). "When the necessary inference is so tenuous that it rests merely upon speculation and conjecture, it is the duty of the court to withdraw the case from the jury." *Love v. King*, 784 F.2d 708, 711 (5th Cir. 1986).

The Defendants contend that summary judgment should be granted in their favor for the following reasons: (1) with no state action involved in this case, the Plaintiffs cannot obtain relief under either the Fourteenth Amendment or 42 U.S.C. § 1983; (2) although 42 U.S.C. § 1985 has been interpreted to prohibit some conspiracies by private parties, it has not been extended to cover the situation alleged by the Plaintiffs; (3) without a valid claim under § 1985, the Plaintiffs cannot obtain relief under 42 U.S.C. § 1986; (4) neither the Equal Protection

clause nor the Due Process clause of the Texas Constitution apply to the activities of private citizens and private organizations; (5) 42 U.S.C. § 1343, cited as a ground for relief by the Plaintiffs, does not exist; and (6) no breach of contract occurred.

B. § 1343

The Court is unable to locate any § 1343 within Title 42 of the United States Code that was in force during the time of alleged actions that are the focus of this suit took.. The Court agrees with the Defendants that the Plaintiffs' claim under 42 U.S.C. § 1343 should be stricken.

C. §§ 1985 and 1986

Regarding the Plaintiffs' claims under § 1985 and § 1986, § 1985 prohibits conspiracies intended to deprive any person or class of persons of voting rights, equal protection of the law, or equal privileges and immunities under the Constitution. 42 U.S.C. § 1985(3).[4] In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Defendants note, the Supreme Court for the first time extended this section to cover conspiracies between private parties.

> "There appear to be three possible forms for a state action limitation on § 1985(3) – that there

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[4] The Plaintiffs, in their response to the Defendants' amended motion for summary judgment, contend they have also stated a valid claim under § 1985(2). The Court finds that portion of the statute, which deals with conspiracies to intimidate or influence witnesses or jurors in federal proceedings, has no bearing on this case.

> must be action under color of state law, that there must be interference with or influence upon state authorities, there must be a private conspiracy so massive and effective that it supplants those authorities and thus satisfies the state action requirement."

Id. at 98. The Defendants contend, however, that because *Griffin* addressed only a conspiracy to violate the constitutional right to interstate travel,[5] that no precedent exists to extend § 1985(3) to cover the situation presented in the case at bar.

> "That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. . . . The Constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose – by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment [adopted with the original bill in 1871]. . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

Id. at 101-02 (emphasis in original).

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[5] *See Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745, 747 (1868).

The Court rested its decision in *Griffin* on allegations that a conspiracy had been launched to deprive the plaintiffs, whom the defendants believed to be black civil rights workers, of their right to interstate travel and also of their 1st Amendment right of freedom of association. *Id.* at 106. The Court added that "[i]n identifying these two constitutional sources of congressional power, we do not imply the absence of any other." *Id.* at 107.

However, in a later decision, *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983), the Court narrowed its interpretation of § 1985(3). In that case, dealing with an assault upon non-union workers by union supporters, the Court held that "an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State." *Id.* at 830. The Court arrived at this holding by examining the constitutional amendments upon which § 1985(3) is based. Neither the First Amendment ("Congress shall make no law . . . ") nor the Fourteenth Amendment protect against wrongs done by private individuals; state action is a requisite of both amendments. *Id.* at 831-32. *Griffin*, however, could be distinguished, the Court said, because that case involved allegations of violations of the Thirteenth Amendment and the right to travel, both of which protect their respective rights against interference by public and private conspirators. *Id.* at 832-33.

The Plaintiffs at bar have characterized the Defendants' alleged conspiracy as seeking to deprive Troop 32 Scouts of their First Amendment right to freedom of association; their Fourteenth Amendment right to equal

protection; the right not to be deprived of property without due process of law, established by the Fifth Amendment; and their privileges and immunities of citizenship, set forth in the Fourteenth Amendment and in Art. IV, § 1, of the Constitution. All of these rights are guaranteed against abridgment from the government, but not against the interferences of private parties. *See Grossling v. Ford Memorial Hospital,* 614 F. Supp. 1051, 1057 (E.D. Tex. 1985). The Defendants, contrary to the Plaintiffs' assertions, are private parties, not state actors.

The Plaintiffs' allegation that the Defendants conspired against disadvantaged boys also would not present a claim under § 1985(3), as construed in *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott.* "We . . . cannot construe § 1985(3) to reach conspiracies motivated by economic or commercial animus," the Court stated. *United Brotherhood of Carpenters and Joiners,* 463 U.S. at 838; *see Charter Medical Corp. v. Miller,* 605 S.W.2d 943, 951 (Tex. Civ. App. – Dallas 1980, writ ref. n.r.e.).

The Plaintiffs' only hope of presenting a claim under § 1985(3), it appears, would be to assert a conspiracy to deprive individuals of their rights due to a "class-based, invidiously discriminatory animus." *Griffin* at 102.[6] The Plaintiffs allege that the Defendants' actions were

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[6] *Griffin* stated the Thirteenth Amendment as grounds for allowing an action under § 1985(3) against private conspirators. In *International Brotherhood of Carpenters and Joiners,* the Court inferred the *Griffin* Court to have construed the alleged wrongs to be violations of the Thirteenth, Fourteenth and Fifteenth Amendments. *Id.* at 837. In any case, it appears the *Carpenters* Court considered *Griffin* to be aimed squarely at Ku Klux Klan efforts to impede blacks in the exercise of their rights.

prompted by an animus toward Hispanic and Catholic boys.

However, the Plaintiffs have failed to present any evidence tending to show that any rights were denied against these groups of boys or any other constitutionally protected class. Although the Plaintiffs have stated that boys were discriminated against, they have not set forth evidence demonstrating a pattern of discrimination against Hispanic boys or black boys. The Plaintiffs have merely stated that they believe some members of Troop 32 were treated unfairly by the Defendants.

Therefore, the Court finds the Plaintiffs' claim under § 1985 should be dismissed. With no available claim under § 1985, the Plaintiffs may not seek relief pursuant to § 1986. *See Hamilton v. Chaffin*, 506 F.2d 904, 913-14 (5th Cir. 1975). That claim, too, then must be dismissed.

D. Fourteenth Amendment and § 1983

The Fourteenth Amendment prohibits discrimination made by state action. Section 1983 bans discrimination occurring under color of state law. These laws may be viewed as equivalent in the context of this type of suit. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928-35 (1982). Neither law, however, has been held to apply to the actions of private persons. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *United States v. Classic*, 313 U.S. 299, 326 (1941).

The Plaintiffs here contend the Defendants are state actors, operating under color of law. The primary reason the Plaintiffs cite for this conclusion is that the national

organization of the Boy Scouts was chartered by an act of Congress, 36 U.S.C. 21. *The Plaintiffs also list the following* other factors that they contend should persuade the Court to consider the Boy Scouts a public organization: (1) the Defendant Longhorn Council received some government funding; (2) the Longhorn Council recruits Scouts in public schools; (3) across the country, some chapters of the Parent Teacher Association sponsor scout troops; (4) police and fire departments in other areas sponsor Explorer Scouting programs; (5) Boy Scout camp mess halls receive surplus commodities from the U.S. Department of Agriculture; (6) some Air Force cadets serve as counselors at a Scout camp as part of their training; (7) funds have been distributed to Scout troops under the federal Model cities program; (8) both the Longhorn Council and the Texoma Valley Council hold Scout camp on land owned by the U. S. Army Corps of Engineers; (9) Eagle Scout candidates are required to earn merit badges signifying they can aid local police and firefighting organizations in emergency situations; (10) church groups and other organizations have been given access to Longhorn Council Scout camps, and a county construction crew graded the road leading to the lake at one of these camps; and (11) public governments and agencies are often the beneficiaries of the good works performed in Eagle Scout service projects.

The Plaintiffs have presented copies of newspaper articles that mention PTA sponsorship of Scout troops; police and fire department sponsorship of Explorer programs; a service project on transportation of hazardous materials performed by Scouts in the city of Hurst, Texas, in conjunction with the local fire department; and stories

stating that some Scout troops, but none in the Longhorn Council, received federal funds under the Model Cities program in 1974. The Plaintiffs have produced no evidence in support of their other contentions.

The Court finds the Plaintiffs' evidence lacking. First, even if the Boy Scouts could be painted as a government organization due to their federal charter, the Fourteenth Amendment and § 1983 prohibit only *state* action; neither regulates the conduct of federal bodies. *Zernial v. United States*, 714 F.2d 431, 435 (5th Cir. 1983).[7]

Second, although the Supreme Court has held that a private party may be considered a state actor, the Plaintiffs have not shown the necessary degree of state involvement. Private action can become state action "if the State creates the legal framework governing the conduct, *e.g.*, *North Georgia Finishing, Inc. v. Di-Chem., Inc.*, 419 U.S. 601 . . . (1975); if it delegates its authority to the private actor, *e.g.*, *West v. Atkins*, 487 U.S. 42 . . . (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, *e.g. Burton v. Wilmington Parking Authority*," 365 U.S. 715 (1961). *National Collegiate*

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[7] The Plaintiffs ask the Court to compare the Boy Scouts of America to the Veterans of Foreign Wars (VFW), which also was chartered by an act of Congress, citing *Stearns v. Veterans of Foreign Wars*, 353 F. Supp. 473 (D. D.C. 1972), *remanded*, 500 F.2d 788 (D.C. Cir. 1974). As the Defendants point out, once *Stearns* was remanded from the D.C. Circuit, the district court determined that the VFW was not a state actor, a decision that was subsequently upheld. *Stearns v. VFW*, 394 F. Supp. 138 (D. D.C. 1975), *aff'd*, 527 F.2d 1387 (D.C. Cir.) (without opinion), *cert. denied*, 429 U.S. 822 (1976).

Athletic Association v. Tarkanian, 488 U.S. 179, 192 (1988).[8] "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *see Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

The standards are high. Organizations that merely carry out a function usually found by the public have not been found to be state actors. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (private utility company not state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school for maladjusted children not state actor). Also, being granted certain rights or otherwise influencing state programs have also been held to be conduct insufficient to allow a private organization to be characterized as a state actor. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987) (Congress granting an organization an exclusive licensing right to a design does not make organization a state actor)[9]; *Blum v. Yaretsky*, 457 U.S. 991 (1982) (state withholding benefits based upon the actions of a private organization does not make organization a state actor); *Langston v. ACT*, 890 F.2d 380 (11th Cir. 1989); (state university's reliance on

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[8] In *National Broadcasting Co. v. Communications Workers of America*, 860 F.2d 1022 (11th Cir. 1988), the Eleventh Circuit restated the Supreme Court standard as involving three tests: (1) the public function test, (2) the state compulsion test, and (3) the nexus/joint action test. *Id.* at 1026.

[9] The Boy Scouts, likewise, are granted an exclusive license to certain emblems, badges, marks, words and phrases, pursuant to 36 U.S.C. § 27.

scores provided by a private testing program does not make testing service a state actor).

The Courts have considered this question in cases involving many types of organizations whose rules can influence the success of young people, including the National Collegiate Athletic Association, the American College Testing Program, the National Honor Society. *National Collegiate Athletic Association v. Tarkanian; Langston v. ACT; Dangler v. Yorktown Central Schools,* 771 F. Supp. 625 (S.D.N.Y. 1991). In the *Tarkanian* case, the Supreme Court described the NCAA as "an organization that is independent of any particular State." *Tarkanian* at 193. The Boy Scouts is a similarly national group.

In a recent case, the Northern District of Illinois found the Boy Scouts should not be considered a "public accommodation" under the definition of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a. In *Welsh v. Boy Scouts of America,* 1992 WL 59083 (N.D. Ill. March 13, 1992), the Court stated as follows:

> "The kinds of activities in which Boy Scout, Cub Scout, and Tiger Cub groups typically engage are not dependent upon the accoutrements of any particular location, let alone of a facility one would normally think of as a place of public accommodation. Rather, the success of the Boy Scouts, and the attraction to boys and their parents alike, lies in the sense of community among its participants."

But see National Organization for Women v. Little League Baseball, Inc., 127 N.J. Super 522, 318 A.2d 33 (App. Div.), *aff'd,* 67 N.J. 320, 338 A.2d 198 (1974) (Little League held to be a public accommodation).

Furthermore, *Welsh* presented a situation where a constitutional right, freedom of religion, was directly affected by the Boy Scouts' membership policies. The parties there agreed the plaintiff had been denied admission to a Boy Scout Tiger Cub pack because he did not profess a belief in God. As stated above, the Plaintiffs at bar have failed to set forth any facts showing the members of Troop 32 were discriminated against based on a constitutionally impermissible reason.

Also, the Plaintiffs have not shown that the boys of Troop 32 were deprived of any right, privilege or immunity secured by federal law or the Constitution. To have a property interest in a benefit, one must have a legitimate claim of entitlement to it. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Several courts have ruled, for instance, that membership in the National Honor Society is not an entitlement. *Dangler v. Yorktown Central Schools,* 771 F. Supp. 625 (S.D.N.Y. 1991) (citing *Price v. Young,* 580 F. Supp. 1 (E.D. Ark. 1983); *Karnstein v. Pewaukee School Bd.,* 557 F. Supp. 565 (E.D. Wis. 1983); *Dallam v. Cumberland Valley School Dist.,* 391 F. Supp. 358 (M.D. Pa. 1975). Participation in interscholastic athletics has also been found not to be a property interest afforded constitutional protection. *Sullivan v. University Interscholastic League,* 599 S.W.2d 860, 863 (Tex. Civ. App. – Austin 1980); *Stock v. Texas Catholic Interscholastic League,* 364 F. Supp. 362 (N.D. Tex. 1973); *Mitchell v. Louisiana High School Athletic Ass'n,* 430 F.2d 1155 (5th Cir. 1970). Although the Plaintiffs have alleged that some members of Troop 32 were deprived of a fair opportunity to become Eagle Scouts, the Plaintiffs have made no showing that any right exists granting all

boys an entitlement to become an Eagle Scout. As the District Judge wrote in *Dangler*:

> "If standards have been administered in an arbitrary and capricious manner but not on the basis of any constitutionally prohibited factors, the improper decision does not give rise to a violation of § 1983."

Dangler at 11.

Therefore, regardless of whether the Boy Scouts can be characterized as a state actor, the Plaintiffs are unable to pursue their claim under § 1983 or the Fourteenth Amendment. These claims shall thus be dismissed.

E. Texas Constitution

The Plaintiffs' complaint states that they seek relief under the Texas Constitution, but does not state what particular provisions of the Texas Constitution support their case. The Defendants, in their motion for summary judgment, have interpreted the Plaintiffs claims as being rooted in the Equal Protection and Due Process clauses of the state constitution. In their response, the Plaintiffs state that they seek relief under §§ 17 and 19 of Article One of the state constitution, which prohibit, respectively, the taking of property without just compensation and the deprivation of life, liberty, property, privileges and immunities without due process of law.

As stated above, courts construing the U.S. Constitution and laws of other states have not found membership in a private organization to be a property interest protected against deprivation without due process of law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Dangler v.*

Yorktown Central Schools, 771 F. Supp. 625 (S.D.N.Y. 1991). The Plaintiffs argue that the situation they present is substantially similar to that stated in *Hatley v. American Quarter Horse Association*, 552 F.2d 646 (5th Cir. 1977).

In *Hatley*, the Fifth Circuit held that a horse owner had a right to due process under the Texas Constitution in contesting the national pedigreeing association's refusal to register his colt as a quarter horse. The Circuit Court recognized an economic advantage in the classification of animals for show and breeding purposes, but it did not directly state that all people have a right to membership in private organizations. *Id.* at 655; *see Masonic Grand Chapter of Order of Eastern Star v. Sweatt*, 329 S.W.2d 334, 337 (Tex. Civ. App. – Ft. Worth 1959, writ ref'd n.r.e.) (membership in fraternal organization held to be valuable commodity that enhanced members' business contacts); *Schooler v. Tarrant County Medical Society*, 457 S.W.2d 644, 647 (Tex. Civ. App. – Ft. Worth 1970, no writ) (membership in medical society held a privilege rather than a right).

The Plaintiffs have directed the Court to no cases that can support their position that the opportunity to become an Eagle Scout should be recognized as an entitlement.[10]

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[10] The Plaintiffs cite to *Holzschuher v. Wurzbach*, 286 S.W. 289 (Tex. Civ. App. – San Antonio 1926, writ ref.); *Lochner v. New York*, 198 U.S. 45 (1905), *overruled, Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); and *Hutcheson v. Storrie*, 51 S.W. 848 (Tex. 1899). The *Holzschurer* case deals with filing fees set for candidates for state office. Fairness in elections having been explicitly stated to be a right arising under both the state and federal constitutions, *Holzschuher* does not apply to the case at bar. *Lochner* addresses just compensation for labor, *Hutcheson v.*

Furthermore, the Court agrees with the Defendants' statement that the Equal Protection and Due Process clauses of the Texas Constitution have not been applied to regulate the relations of private citizens. *Charter Medical Corp. v. Miller,* 605 S.W.2d 943, 951 (Tex. Civ. App. – Dallas 1980, writ ref. n.r.e.).[11]

For these reasons, the Court grants summary judgment against the Plaintiffs' claims under the Texas Constitution.

F. Breach of Contract

Finally, the Defendants ask the Court to grant it summary judgment on the Plaintiffs' breach of contract claim. Here, the Plaintiffs contend that the Boy Scouts have violated their own rules governing the requirements for advancement to Eagle Scout status. In response, the

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Storrie just compensation for real property. Neither case is applicable to this situation, where Boy Scouts performed service projects voluntarily, not in exchange for any certain gain.

[11] Were Plaintiffs bringing this suit under a Texas state law that prohibited the type of discrimination alleged, they might have a legitimate claim. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club,* 481 U.S. 537 (1987); *Roberts v. United States Jaycees,* 468 U.S. 609 (1984).

Notably, however, the Boy Scouts and Girl Scouts, along with several other youth service organizations, are exempted from federal prohibitions against sex discrimination. 20 U.S.C. § 1681(a)(6); *see Schwenk v. Boy Scouts of America,* 275 Ore. 327, 551 P. 2d 465 (Ore. 1976); *but see Curran v. Mount Diablo Council of the Boy Scouts,* 147 Cal. App. 3d 712 (2nd Dist. 1983) (holding that Boy Scouts' federal charter does not conflict with application of California's Unruh Civil Rights Act to prohibit the organization from discriminating against homosexuals).

Defendants state that courts traditionally avoid interference with the internal organization and policies of voluntary clubs and associations. *Harden v. Colonial Country Club*, 634 S.W.2d 56, 59-60 (Tex. App. – Ft. Worth 1982, writ ref. n.r.e.).

This argument notwithstanding, the Plaintiffs have failed to shore up their contention with any evidence. They have not submitted copies of any of the internal policies and documents of the Boy Scouts that they contend have been violated, nor have they provided the Court a copy of the contested workbook. Therefore, because no issues of material fact have been produced to support the Plaintiffs' breach of contract claim, the Court finds summary judgment should be granted for the Defendants on this claim.

III. Motion for Intervention

The parents of several Troop 32 Scouts, as next friends of those boys, have filed a motion to intervene in this case. The intervention of these Scouts would supply the proper parties necessary to continue this suit, since the current Plaintiffs, as scoutmasters, lack standing. The district court has discretion to decide whether a motion to intervene should be denied as untimely. Fed. R. Civ. P. 24(a); *see Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285 (5th Cir. 1987), *cert. denied*, 484 U.S. 817 (1987).

This motion to intervene was filed months after the motion for summary judgment became ripe. Having found, above, that the Plaintiffs have presented absolutely no evidence to defeat the Defendants' motion for summary judgment, allowing intervention at this time

would be futile, and a waste of resources. Therefore, the Court hereby DENIES the motion to intervene as moot.

IV. Motion That Facts Be Taken as Established

The Plaintiffs' motion that facts be taken as established, filed September 19, 1991, appears to request that the Court take judicial notice of certain quotes from certain Boy Scout handbooks and organizational documents and that the facts posed in the Plaintiffs' interrogatories be deemed admitted, due to the Defendants' failure to fully respond to the questions, or, in the case of some Defendants, respond at all. The Defendants respond that the Plaintiffs' motion is untimely, being filed twenty months past the discovery deadline set in this case. The Defendants also contend that the Plaintiffs' motion lacks merit and requests improper relief. The Defendants ask the Court to consider imposing sanctions against the Plaintiffs for bringing this motion.

The Court finds the Plaintiffs' motion that facts be taken as established to be without merit. This motion is hereby DENIED.

On January 30, 1992, the Plaintiffs filed another discovery-related motion, styled "Motion to Compel Further Response to Interrogatories." This motion is rendered moot by this Memorandum opinion and order.

V. Conclusion

Summary judgment is hereby GRANTED for the Defendants. The motion to intervene is DENIED as moot.

SO ORDERED.

This 24th day of June, 1992.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT
JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

A. L. CROUCH and M. REASE PARTON	§ §	
v.	§	NO. 3:88-CV-2531-P
BOY SCOUTS OF AMERICA, ET AL.	§ §	

FINAL JUDGMENT

(Filed JUN 24, 1992)

This action came on before the Court on Defendant's Motion for Summary Judgment on Plaintiffs' Amended Complaint, filed February 27, 1989, Honorable Jorge A. Solis, presiding.

It is ORDERED and ADJUDGED that Defendant's Motion for Summary Judgment on Plaintiffs' Amended Complaint is hereby **GRANTED**; therefore, this action is hereby **DISMISSED** with prejudice. It is FURTHER ORDERED and ADJUDGED that all relief not specifically granted herein is denied.

SIGNED this 24th day of June, 1992.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT
JUDGE

[SEAL]

The State of Texas

SECRETARY OF STATE

IT IS HEREBY CERTIFIED that a diligent search of the active and inactive records of this Office reveals no Texas corporation organized under the name

NATIONAL COUNCIL BOY SCOUTS OF AMERICA

IT IS FURTHER CERTIFIED that a diligent search of the active and inactive records of this Office reveals no foreign corporation under the above name which has authority to transact business in Texas.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin this

25th day of MARCH A.D. 1992

/s/ John Hannah Jr.
Secretary of State

[SEAL]

The State of Texas

SECRETARY OF STATE

IT IS HEREBY CERTIFIED that a diligent search of the active and inactive records of this Office reveals no Texas corporation organized under the name

BOY SCOUTS OF AMERICA NATIONAL COUNCIL

IT FURTHER CERTIFIED that a diligent search of the active and inactive records of this Office reveals no foreign corporation under the above name which has authority to transact business in Texas.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this

25th day of MARCH, A.D. 1992

/s/ John Hannah Jr.
Secretary of State

LONGHORN COUNCIL, BOY SCOUTS OF AMERICA

In the Fort Worth Area:

Two out of six boys ages 6-10, and
One out of four boys ages 11-14 are Scouts
One out of every six youth served by the council is Hispanic
One out of ten young men and women ages 15-18 in career guidance programs

The Longhorn Council serves 82 public school districts in the eleven county geographic area.

In the council, 15 separate school districts use the Scouting program as a part of their curriculum.

The Longhorn Council operates five Scout Camps which will serve over 15,000 members this year.

Approximately 40% of the Longhorn Council's operating budget is provided by the United Way.

The Longhorn Council has ongoing programs and support materials for:

Single parents and their children

"Latch Key" or at home alone children
Drug awareness and counseling programs

Child abuse

Over 3000 mentally and physically handicapped individuals will be a participant in Scouting activities this year.

The Longhorn Council and Special Olympics, Texas Area 11, have formed a cooperative to provide more program

opportunities to our communities' handicapped population.

The Council's youth membership will participate in 5.5 million hours of program time this year.

[SEAL]
[SEAL]

[SEAL]

The State of Texas

Secretary of State

May 7, 1985

CHARLES W MUNTER, REGISTERED AGENT
LONGHORN COUNCIL OF BOY SCOUTS OF AMERICA
100 WEST VICKERY ST
FORT WORTH TX 76104

RE: LONGHORN COUNCIL OF BOY SCOUTS OF AMERICA CHARTER NO. 095057-1

OUR RECORDS SHOW THAT YOU WERE NOTIFIED THAT THE ABOVE REFERENCED CORPORATION HAD NEGLECTED TO FILE THE REPORT REQUIRED UNDER THE PROVISIONS OF ARTICLE 1396-9.01, TEXAS NON-PROFIT CORPORATION ACT. THE REPORT WAS NOT FILED WITHIN THE TIME PERIOD PRESCRIBED BY LAW, AND CONSEQUENTLY, THE CORPORATION'S RIGHT TO CONDUCT AFFAIRS WAS FORFEITED.

THE 120-DAY PERIOD DURING WHICH THIS DELINQUENCY MAY HAVE BEEN CORRECTED HAS EXPIRED, AND THE CORPORATION HAS BEEN INVOLUNTARILY DISSOLVED BY ORDER OF THE SECRETARY OF STATE. ENCLOSED IS A COPY OF THAT CERTIFICATE OF INVOLUNTARY DISSOLUTION.

ANY CORPORATION INVOLUNTARILY DISSOLVED FOR THIS DELINQUENCY MAY BE REINSTATED AT ANY TIME BY FILING THE REPORT PRESCRIBED BY ARTICLE 1396-9.01, TEXAS-NON PROFIT CORPORATION ACT, TOGETHER WITH A FILING FEE OF $29.00,

AS PRESCRIBED BY ARTICLE 1396-9.02F, TEXAS NON-PROFIT CORPORATION ACT.

SINCERELY,

JIMMY P. DELAD
ATTORNEY
CORPORATIONS SECTION

ENCLOSURE

[LOGO]
SCOUTING/USA

A program for Cub Scouts, Boy Scouts, and Explorers

National Office
BOY SCOUTS OF AMERICA

1325 Walnut Hill Lane,
Irving, Texas 75038-3096
Telephone: 214-580-2000

August 26, 1988

Mr. A.L. Crouch
6940 Richlynn Terrace
Ft. Worth, TX 76118

Dear Judge Crouch:

The complaint and petition from three registered Scouters of Troop 32 concerning use of the Eagle Scout Service Project Workbook by the Longhorn Council was received and has been reviewed.

The National Boy Scout Committee through its subcommittee on advancement establishes the requirements for skill awards, merit badges, ranks, and Eagle Scout Palms. Additionally, this committee establishes the procedures by which local councils, districts, and units implement the advancement program.

Advancement Guidelines, #3087A is written for persons responsible for advancement at the council and district level. This publication is intended to help these individuals understand and interpret the advancement programs and procedures of the Boy Scouts of America.

The local council advancement committee has the responsibility to establish procedures within the framework of national policy.

The Eagle Scout Service Project Workbook was developed by the National Boy Scout Committee and is made available to local councils for their use in carrying out their responsibility.

The Longhorn Council Advancement Committee has determined that the Eagle Scout Service Project Workbook will be used. This decision to use the Workbook is not in conflict with the National Council. Therefore, Scouts in the Longhorn Council desiring to advance to the rank of Eagle Scout must use the Eagle Scout Service Project Workbook in meeting Requirement #5 for the Eagle Scout rank.

It is my recommendation that you as Scoutmaster of Troop 32 become familiar with the advancement procedures established by the Longhorn Council and to follow these advancement procedures in a positive manner.

Most of the difficulties experienced by members of Troop 32 in prior years would not have occurred had you done so.

I appreciate the opportunity to respond to the complaint and petition.

Cordially,
/s/ Ben H. Love
Ben H. Love
Chief Scout Executive

bw
cc: Longhorn Council, #582